Office-Supreme Court, U.S.
FILED
OCT 6 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 635

OCTOBER TERM 1966

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, THE HEARST CORPORATION, NEWSPAPER ENTERPRISES, INC., LONG ISLAND DAILY PRESS PUBLISHING CO., INC., 125 BARCLAY STREET, INC., NEWS SYNDICATE CO. INC. and THE NEW YORK TIMES COMPANY,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN R. SCHOEMER, JR.
Attorney for Petitioners
220 East 42nd Street
New York, New York 10017

October 4, 1966

INDEX

	PAGE
PETITION	1
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement	3
A. The Collective Bargaining Relationships	3
B. The Board's Decision and Order	6
C. The Decision of the Court of Appeals	7
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:

American Ship Building Co. v. N. L. R. B., 380 U. S. 300 (1965) 8

Bell Bakeries, 139 NLRB 1344 (1962) 6

Brown Food Stores, 137 NLRB 73 (1962), *enf. den. sub nom.* Brown v. N. L. R. B., 319 F. 2d (10th Cir. 1963), *aff'd* 380 U. S. 278 (1965) 8, 10, 14

Buffalo Linen Supply Co., 109 NLRB 447 (1954), *enf. den. sub nom.* Truck Drivers Local Union v. N. L. R. B., 231 F. 2d 110 (2d Cir. 1956); *rev'd* 353 U. S. 87 (1957) 8-9, 11, 12

PAGE

Buzza-Cardoza, 97 NLRB 1342 (1952), *enf'd* 205 F. 2d 889 (9th Cir. 1953) 14

Clune v. Publishers' Assn. of N. Y. C., 214 F. Supp. 520 (S. D. N. Y.), *aff'd* 314 F. 2d 343 (2d Cir. 1963) .. 5
Coca-Cola Bottling Works Co., 91 NLRB 351 (1950) 6

Dittler Bros., Inc., 132 NLRB 444 (1961) 6, 12

Evening News Association, 154 NLRB No. 121 (1965) 6, 7, 9

N. L. R. B. v. Burroughs Corp., 261 F. 2d 463 (2d Cir. 1958) 14
N. L. R. B. v. Philamon Laboratories, 298 F. 2d 176 (2d Cir. 1962) 14
N. L. R. B. v. Sheridan Creations, Inc., 357 F. 2d 245 (2d Cir. 1966) 7
Newspaper Drivers' Union v. Detroit Newspaper Pub. Assn., 382 U. S. 374 (1966) 8

Old King Cole v. N. L. R. B., 260 F. 2d 530 (6th Cir. 1958) 14

Publishers' Assn. of N. Y. C., 139 NLRB 1092 (1962), *aff'd* 327 F. 2d 292 (2d Cir. 1964) 8

Retail Associates, Inc., 120 NLRB 388 (1958) 11, 12

Stouffer Corp., 101 NLRB 1331 (1952) 12

Tom Thumb Stores, Inc., 123 NLRB 833 (1959) 14
Tulsa Sheet Metal Works, 149 NLRB 1487 (1964) 7

PAGE

Others:

AM. BAR ASSN. LABOR LAW SECT. PROGRAM (1966) 423, *Report of the Committee on the Development of the Law under the N. L. R. A.* 10

Cox, *The Uses and Abuses of Union Power*, 35 NOTRE DAME LAWYER 624, 630 (1950) 11

EMPLOYER ASSOCIATIONS ENGAGED IN COLLECTIVE BARGAINING IN NEW YORK STATE (State Dept. of Labor, 1965) pp. A1, A7 10

Jones, *The N. L. R. B. and the Multi-Employer Unit*, 5 LABOR L. J. 34, 37 (1954) 11

MAJOR UNION CONTRACTS IN THE UNITED STATES (U. S. Dept. of Labor Bull. 1353) 10

Meltzer, *Single-Employer and Multi-Employer Lockouts under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956) 11

Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process, House Labor Comm. Rep., 88th Cong., 2d Sess. (1964) 13

Note, 41 N. Y. U. L. REV. 651 (May 1966) 10

Petition for Certiorari, *N. L. R. B.* v. *Brown*, October Term 1963, No. 558, p. 10 10

Sweetall & Aiges, *Lockouts*, 9 LABOR L. J. 43 (1958) 7

IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM 1966

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, THE HEARST CORPORATION, NEWSPAPER ENTERPRISES, INC., LONG ISLAND DAILY PRESS PUBLISHING CO., INC., 125 BARCLAY STREET, INC., NEWS SYNDICATE CO. INC. and THE NEW YORK TIMES COMPANY,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Publishers' Association of New York City *et al.* petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit entered in this case on July 25, 1966.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported, but appears at Appendix A, *infra*, pp. 17-25. The decision and order of the National Labor Relations Board (12a-17a [in Petitioners' Appendix]) are reported at 156 NLRB No. 16 (December 21, 1965).

Jurisdiction

The decision of the Court of Appeals was rendered on July 25, 1966. On August 8, 1966, petitioners filed a petition for rehearing, which was denied. The court's decree was filed on August 26, 1966 (App. A, p. 26, *infra*), but on September 8, 1966 it was recalled and its reissuance stayed pending this application (p. 28, *infra*).

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §10(e) and (f) of the National Labor Relations Act, as amended.

Question Presented

Whether a union which has historically bargained in a multiemployer bargaining unit may unilaterally and for any reason withdraw from the unit and demand that future bargaining be conducted in separate units, for the refusal of which the employers may be adjudged to have violated §8(a)(5) of the Act.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. §§151 *et seq.*) are set forth in Appendix B, *infra*, pp. 29-31.

Statement

A. *The Collective Bargaining Relationships*

For more than fifty years petitioners[1] have bargained with New York Typographical Union No. 6[2] as the representative of newspaper composing room employees (21a).

In May 1964 a Board trial examiner held that the pressmen's union had the right to demand separate units at the Detroit newspapers (36-37a). The following month petitioners were informed by the Typographical Union that it would no longer continue bargaining in the existing Association unit but wished to negotiate separately for

[1] The petitioning Publishers' Association is an unincorporated association which for many years has represented the New York City newspapers in their dealings with the craft unions representing employees in their production and delivery departments (21a). The corporate petitioners fall into two groups: (1) those now publishing newspapers in New York City (News Syndicate Co. Inc. [Daily News], The New York Times Company, Newspaper Enterprises Inc. [Long Island Star Journal] and Long Island Daily Press Publishing Co.), and (2) those which published newspapers prior to April 24, 1966 but no longer do so (The Hearst Corporation, successor to New York Journal American Division of Hearst Consolidated Publications, Inc., and 125 Barclay Street, Inc. [formerly New York World-Telegram Corporation]). Also a respondent before the Board (16a), but not a petitioner in the court below, was New York Herald Tribune, Inc. See notes 3 and 5 *infra*.

[2] The Union was granted leave to intervene before the Court of Appeals, without objection, and is named as a respondent herein.

new contracts to replace the Association contract expiring March 30, 1965 (288a). Denying that the Union "has the unilateral right to disregard and overturn joint collective bargaining relationships that have existed for many years", petitioners refused the demand (291a). This refusal, without more, was found by the Board to be an unfair labor practice.

The New York newspapers and the unions face each other across the bargaining table in two groups. On the management side, the employers deal with nine craft unions through the Publishers' Association. Its composition has changed over the years, chiefly because of the closing of individual papers;[3] but today all the newspapers still publishing (except the New York Post) bargain through the Association.

The union group has also undergone membership changes (179a, 210a, 240a). Under the leadership of the Typographical Union, the combined unions pledged themselves in 1962 to "unified action" in their dealings with the Association, adopting the principle that "no one union in the group is expected to sign a contract with the publishers which has economic terms that are not satisfactory to the whole group" (276-77a). At contract expiration in December 1962, one of the unions reached tentative agreement

[3] The Brooklyn Eagle and the Sun shut down in the 1950's; the Daily Mirror permanently suspended six months after the 1962-1963 strike (84a, 218a); the Wall Street Journal resigned when it moved its printing operations out of the city (214a); the New York Herald Tribune resigned in 1954, returned in 1956; resigned again in September 1965 (14a, 216a). It returned to the Association in 1966 as a constituent of a new company formed from the merger of three newspapers but never resumed publication, announcing its closing some four months after the start of a strike against the merged papers that had prevented their starting up.

with the publishers, but a majority of the other unions voted it down (143a), and the Typographical Union began a whipsaw strike against some of the papers, resulting in the voluntary suspension of the others. The union group supported the strike.[4] Since that time there have been two additional strikes against some of the New York papers.[5]

The Reasons for Withdrawal. Claiming that the Board was under a duty to examine the good faith of the Union's withdrawal and to make a comparative evaluation of the appropriateness of single *v.* multiple units, petitioners offered proof that the Union had no need for separate units. This proof was said by the dissenting Board member to show that "no justifiable reason" existed for withdrawal (17a).

The Union conceded that all its "reasons" for separate contracts had existed for many years; no recent change in circumstances had occurred (86a, 175a, 234a). While professing a need to bargain on the basis of individual ability to pay (221a), it admitted that (a) wages and conditions had always been uniform with the publishers, whether they were in or out of the Association (232a); (b) efforts by "weaker" papers to secure preferential contracts during

---

[4] The relevant facts are stated in *Clune* v. *Publishers' Assn. of N. Y. C.*, 214 F. Supp. 520 (S. D. N. Y.), *aff'd* 314 F. 2d 343 (2d Cir. 1963), and also at 79a-81a.

[5] Subsequent to the hearing in this case, but noted by the Board in its decision (14a), the Newspaper Guild began a strike against The New York Times, and the other papers shut down in its support. On April 24, 1966, the Guild began a strike against a new company into which three of the newspapers had been combined, and the other unions (including the Typographical Union) refused to allow their members to work for the new company until agreement was reached with all the unions. Publication finally began 141 days later, on September 12, 1966.

strikes were rebuffed by the Union (85-86a); and (c) even while separate units were being demanded in 1964 the Union had handed the publishers identical contract proposals (231a).[6] Moreover, the Union's internal procedures require that each separate contract be ratified by the entire membership of the Union (251a), thus guaranteeing uniformity among the "separate" units, as if the Union were still bargaining in the old Association units.

The Board, however, declined to consider any of this evidence.

B. *The Board's Decision and Order*

The Board's 2-1 decision was based on its earlier decision in *Evening News Assn.*, 154 NLRB No. 121 (1965) (printed at 36-57a). Conceding the good faith of these petitioners in opposing single units (22a, 13a), the majority nevertheless held that the refusal to bargain in the form demanded by the Union violated §8(a)(5). The Board refused to examine the Union's reasons for withdrawing and to determine whether these were adequate, instead treating the case as merely one of mutual consent and reciprocity of withdrawal privileges. As multiemployer bargaining is "grounded" on the consent of both parties, the Board said, it would not be "logical" to deny the Union the right to withdraw while employers are permitted to do so for any reason[7] (14a).

---

[6] The 1965-67 contract later signed (in the traditional form, but without prejudice to the Union's demand for separate units) provides that the parties will endeavor to develop systems of industry-wide hiring and seniority.

[7] Cf. *Coca-Cola Bottling Works Co.*, 91 NLRB 351 (1950); *Dittler Bros., Inc.*, 132 NLRB 444 (1961), modified in *Bell Bakeries*, 139 NLRB 1344 (1962), where employers were not allowed to with-

Member Brown, dissenting, noted that union withdrawal[8] necessarily dissolved the bargaining relationship (17a):

> "And, where no justifiable reason appears therefor, as none does in this case, the cause of industrial stability suffers."

The Board's order directs the petitioning publishers "upon request" to bargain collectively with the Union in separate composing room units (32a).

C. *The Decision of the Court of Appeals*

Commenting that the Board's rule "has the advantage of simplicity and of apparent equality of treatment" (App. A, p. 20), the Court granted enforcement of the Board's order.[9] It observed, however, that the Board's position was "not wholly free from doubt" in determining that Congress did not intend to instruct the Board to require a

---

draw. And see *N. L. R. B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (2d Cir. 1966), upholding the Board's ban on withdrawals during negotiations.

[8] In his dissent in *Evening News*, Member Brown observed that "withdrawal" is a misnomer, "for a union does not withdraw unilaterally, but compels an employer to forego group action and pursue an independent course" (52a).

[9] *Cf.* Chief Judge Lumbard, dissenting, in *Sheridan Creations* (357 F. 2d at 250):

> "Neither potential instability of the bargaining process nor administrative convenience requires substituting a flat rule prohibiting withdrawal after negotiations have begun in place of an inquiry as to bad faith and possible harmful effects."

And see also Sweetall & Aiges, *Lockouts*, 9 Labor L. J. 43, 51 (1958), advocating "a careful appraisal of all the circumstances *in each case*" of union withdrawal by the Board. See also *Tulsa Sheet Metal Works*, 149 NLRB 1487 (1964) ("the ultimate determination with respect to timely withdrawal must turn upon a discriminating evaluation of all attendant facts and circumstances").

union to remain in multiemployer bargaining, and it remarked that the contrary arguments were "forcefully" stated in Member Brown's two dissents (*id.* at 21).

While the Court agreed that the blanket sanction of union withdrawals "may have much more harmful effect * * * than the withdrawal of one or more employers" and may "substantially tilt the balances" (*id.* at 21-22), it dismissed as "not entirely justified" petitioners' fears about their defense to whipsaw strikes in separate units.[10]

Judge Kaufman, concurring specially, agreed that alleviation must come from Congress, not from the courts, but expressed forebodings about a decision allowing "the history of more than 50 years of multiemployer bargaining [to] be disrupted upon the whim of one of the parties without any reasons assigned and with more abrasiveness sure to follow as a result" (p. 24).

Reasons for Granting the Writ

1. As the Court of Appeals observed (p. 20), the question answered by the Board for the first time in *Evening News* and in this case was expressly left open by this Court in *N. L. R. B.* v. *Truck Drivers' Local*, 353

---

[10] These fears have of course eased. *N. L. R. B.* v. *Brown*, 380 U. S. 278 (1965); *American Ship Building Co.* v. *N. L. R. B.* (*id.* 300); but see *Newspaper Drivers' Union* v. *Detroit Newspaper Publishers Assn.*, 382 U. S. 374 (1966). But problems still exist. By achieving staggered expiration dates among the employers the Union can curtail the defense to a strike against the employer with the earliest expiration date. Suspension by the other employers, with valid and subsisting contracts, would create serious back pay hazards, either from the Board or from arbitrators. Similarly, the right of joint defense against breach of contract strikes in a single unit, *Publishers' Assn. of N. Y. C.*, 139 NLRB 1092, *aff'd* 327 F. 2d 292 (2d Cir. 1964), is put in doubt.

U. S. 87 (1957). There the Board had sanctioned a lockout by members of a multiemployer association when the union struck only one of the members at contract expiration. *Buffalo Linen Supply Co.*, 109 NLRB 447 (1954). The Second Circuit reversed by a divided court, with Judge Frank for the majority observing in passing that it "would seem only fair" for the union to be granted the same voluntary withdrawal privilege as the employer (231 F. 2d 110, 115).

This Court held that the Board's discretion in permitting lockouts was not to be interfered with by the courts and that the Board had correctly balanced the conflicting interests in deciding that a lockout designed to preserve the integrity of multiemployer bargaining against the threat of the whipsaw strike was lawful. Speaking of Judge Frank's dictum, Mr. Justice Brennan said (353 U. S. at 94, n. 22):

> "The Court of Appeals vigorously argued that a union should be accorded the same freedom of voluntary withdrawal from a multi-employer bargaining unit as the Board has accorded to individual employers. But that question is not presented by this case, and we expressly reserve decision until it is properly before us."

The question is now presented by the instant case for the first time.[11]

2. The question is one of transcendent importance to the law of labor relations, for the result reached by the Board

---

[11] While *Evening News Assn.* was decided by the Board before this case, it has not yet been argued before the Sixth Circuit on review (*Detroit Newspaper Publishers' Assn.* v. *N. L. R. B.*, Nos. 16,855 and 16,856).

"may well augur a complete upheaval in multiemployer bargaining".[12] The Board's statement in successfully applying for certiorari in *N. L. R. B.* v. *Brown*, October Term 1963, No. 558, p. 10, is apposite:

> "[T]he importance of multi-employer bargaining makes it desirable that this Court promptly correct the [error below]. Multi-employer bargaining is common throughout the United States. It is estimated that in 1961 about half of the 329 major collective bargaining agreements (i.e., contracts covering 5,000 or more workers) were multi-employer agreements.[13] Thousands of smaller employers, especially in distribution industries, negotiate through multi-employer associations. The question presented here, like that in the Truck Drivers case, will determine one of the basic rules for multi-employer bargaining. Thus, it affects many thousands of employers and millions of employees."

3. While claiming to have achieved equality of treatment, the Board has ignored equality of result, as the Court of

---

[12] *Report of the Committee on Development of the Law under the National Labor Relations Act*, A. B. A. Labor Law Sect. Program 423 (1966). A law review comment has termed the decision "erroneous". 41 N. Y. U. L. Rev. 651, 656 (May 1966).

[13] These statistics are drawn from Major Union Contracts in the United States, 1961 (U. S. Dept. of Labor Bull. 1353) p. 4, which also points out that 61.6% of employees in printing, publishing and allied industries are covered by multiemployer agreements (p. 2). Typographical Union locals in all except one of the largest U. S. cities (Los Angeles) bargain in multiemployer units (190a-191a).

In New York there are 565 employer associations engaged in collective bargaining. Four of the oldest (over fifty years) are in the printing trades. Employer Associations Engaged in Collective Bargaining in New York State (New York Dept. of Labor, 1965) pp. A-1, A-7.

Appeals noted (*infra*, pp. 21-22). When an employer withdraws from multiemployer bargaining, the structure is left untouched; when a union withdraws "the very identity, nature and composition" of the employer group are overturned (dissenting opinion, 52a). The Board had foreseen this in its pioneer decision in *Retail Associates*, 120 NLRB 388 (1958), where it said it would reject any withdrawal "obviously employed only as a measure of momentary expedience, or strategy in bargaining," enabling the union to enjoy the "benefits" of whipsawing the employers (p. 394). Now it says it cannot impose the "reasonable controls" it had promised in 1958 (120 NLRB at 393) because Congress has not given it the power to do so. But this Court said in *Buffalo Linen*, after noting that the multiemployer form was believed "vital" to "strengthened collective bargaining":

> "The inaction of Congress with respect to multiemployer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation" (353 U. S. at 95-96).

And as one commentator observed, after reviewing the history of limiting proposals put forth during the Taft-Hartley debates, "unlimited rights of union withdrawal from an established unit are as paradoxical as similar rights to an employer to abandon collective bargaining." [14]

Recognizing that the preservation of multiemployer units is "a legitimate end" for employers, *N. L. R. B.* v. *Brown*,

---

[14] Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 94 (1956); see also Jones, *The NLRB and the Multi-Employer Unit*, 5 LABOR L. J. 34, 37 (1954); Cox, *The Uses and Abuses of Union Power*, 35 NOTRE DAME LAWYER 624, 630 (1950).

380 U. S. 278, 289 (1965), this Court has shown no inclination to limit *Buffalo Linen* principles to actual strike situations. Surely the intent of Congress to have the Board assume an active role in multiemployer questions cannot tolerate a Board policy of leaving unions a free hand in manipulating units for their own strategic advantage.

4. In the past, the Board eschewed a *per se* approach and investigated the possible harmful effects of employer and union withdrawals. Thus, attempted withdrawals that were otherwise proper under the Board's rules were nonetheless denied Board sanction, regardless of whether the employer [e.g., *Dittler Bros.*, 132 NLRB 444 (1961)] or the union [*Stouffer Corp.*, 101 NLRB 1331 (1952)] was seeking to withdraw. The test applied was whether, after an investigation of all of the circumstances, the Board judged that the withdrawal would have a harmful impact on the bargaining relationship.

In *Retail Associates*, 120 NLRB at 393, the Board had said it would not permit withdrawals from multiemployer units to be "exercisable at will or whim," for this would be "to neglect its function in delineating appropriate units under Section 9." Later, in *Dittler Bros., supra*, it reiterated that it would not permit abandonment to individual employers of the statutory control of unit determinations.

The rule now announced ignores these pronouncements in favor of a *per se* rule which gives a union:

> (a) The right to decide whether single or multiple units are more appropriate and to dissolve an employer group without any Board action;

(b) A potent weapon by way of a threatened assault on the solidarity of the employer position, thereby injecting an extraneous and explosive issue into the negotiations; and

(c) The right to continue its alliances with other unions, thus compelling individual employers to continue dealings with a coalition of union forces.

5. Association-type bargaining rests on a more solid basis than apprehension about whipsaw strikes. Although both the Board and Court seemed to think this was petitioners' only concern, their long dedication to joint bargaining, going back into the last century (85a), bespeaks a deeper interest. For example, the Publishers' Association functions as the central office through which grievances are channeled and disposed of (113-14a), thus reducing friction in individual plants and stabilizing industry conditions. Employers and unions engaging in association bargaining and contract administration were found by a congressional committee to be almost unanimous in its support:

> "[I]t is abundantly clear that both labor and management, with extremely limited exceptions, are very strong in their support for multiemployer association bargaining and their belief that it is necessary to preserve a rational system of collective bargaining."[15]

---

[15] Report of House General Subcommittee on Labor, *Multi-Employer Association Bargaining and Its Impact on the Collective Bargaining Process* (December 31, 1964) p. 32. The Committee lists seven "advantages" of this form of bargaining, only one of which is the equalization of bargaining strengths (pp. 10-19).

6. While proceedings under §8(a)(5) may properly be used to raise questions of unit appropriateness in the ordinary case, this was not such a case. Petitioners have been branded as violators of the Act for refusing to do something neither the Board nor any court had held was required of them.

When the charge was filed against petitioners some eight months before contract expiration, the contract barred any §9 proceeding to challenge the appropriateness of single units. There was no prior Board determination that single unions would be appropriate; in fact the Board had not yet announced a rule permitting conversion from multiple to single units by union fiat.

Petitioners do not challenge the rule that asserted good-faith doubts will not insulate an employer from a violation of §8(a)(5).[16] But that rule should not be applied to an employer who refuses to abandon the traditional unit on union demand, where there has been no change in circumstances and no finding of appropriateness of the new unit demanded, and the employees will continue to be represented in the existing unit. The employers' endeavors to preserve the integrity of that unit serve a legitimate purpose, *N. L. R. B.* v. *Brown,* 380 U. S. 278, 289 (1965), and should not have been so peremptorily condemned as a violation of §8(a)(5).

---

[16] In 1959 the Board abandoned its earlier doctrine, *Buzza-Cardoza,* 97 NLRB 1342 (1952), that the employer who in good faith disagreed with the unit claimed by the union may insist on certification before bargaining. *Tom Thumb Stores, Inc.,* 123 NLRB 833 (1959). It was upheld by the Court of Appeals, e.g., *N. L. R. B.* v. *Burroughs Corp.,* 261 F. 2d 463 (2d Cir. 1958); *Old King Cole* v. *N. L. R. B.,* 260 F. 2d 530 (6th Cir. 1958); cf. *N. L. R. B.* v. *Philamon Laboratories,* 298 F. 2d 176-179 (2d Cir. 1962) (doubts as to union's majority status).

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the writ of certiorari be granted.

JOHN R. SCHOEMER, JR.
Attorney for Petitioners
220 East 42nd Street
New York, New York 10017

October 4, 1966

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 383—September Term, 1965.

(Argued May 31, 1966 Decided July 25, 1966.)

Docket No. 30222

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, HEARST CONSOLIDATED PUBLICATIONS, INC., NEWSPAPER ENTERPRISES, INC., LONG ISLAND DAILY PRESS PUBLISHING CO., INC., NEW YORK WORLD TELEGRAM CORP., NEWS SYNDICATE CO., INC., and THE NEW YORK TIMES COMPANY,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

NEW YORK TYPOGRAPHICAL UNION NO. 6,

Intervenor.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Petition by Publishers' Association of New York City and individual members to review and set aside order of the National Labor Relations Board, finding each publisher in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and requiring each publisher to cease refusing to bargain with intervenor union, etc., and cross-petition of Board for enforcement.

Petition to review denied, enforcement ordered.

JOHN R. SCHOEMER, JR., New York, N. Y. (Townley, Updike, Carter & Rodgers, New York, N. Y., on the brief), *for petitioners.*

SOLOMON I. HIRSH, Attorney, National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Asst. General Counsel, and George H. Cohen, Attorney, National Labor Relations Board, on the brief), *for respondent.*

JOHN J. SHEEHAN, New York, N. Y., *for intervenor.*

SMITH, *Circuit Judge*:

The Publishers' Association of New York City and individual member publishers petition to review and set aside an order of the National Labor Relations Board, issued December 21, 1965, 156 NLRB No. 16, finding that each publisher, by refusing to bargain collectively with the Union as the duly elected representative of its composing

room employees, was engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U. S. C. §158(a)(5) and (1), and requiring each publisher to cease refusing to bargain with the intervenor union, the New York Typographical Union No. 6, and interfering in any like or related manner with the Union's efforts to bargain with each publisher individually, to bargain on request, and to post notices. The Board cross-petitions for enforcement. We hold the Board's ruling correct, deny the petition for review, and order enforcement.

The Association and Intervenor (as well as a variety of other unions, each on its own) have a long history of multiemployer bargaining, although at times individual publishers have deserted the Association under pressure, and have made separate contracts. A multiemployer contract was effective between the petitioners and the union for the year ending March 30, 1965. But on June 26, 1964, the union notified petitioners that it desired separate contracts with each publisher. On July 21, 1964, the Association rejected this request, and has refused to negotiate contracts except on a multiemployer basis.

The Board found that the union's notice of withdrawal was timely and unequivocal, that the individual employer units were appropriate units, and that each publisher violated §8(a)(5) and (1) of the National Labor Relations Act, 29 U. S. C. §158, by refusing to bargain. The union has a majority of the employees in each individual unit.

The Board's determination was in conformity with its decision in a substantially identical case, *The Evening News Association*, 154 NLRB No. 121 (1965). There, its holding was based largely on the proposition that a multiemployer unit is a purely consensual device which em-

ployers may freely leave as long as notice is timely and unequivocal. Compare *NLRB* v. *Sheridan Creations*, 357 F. 2d 245 (2d Cir. 1966). "Mutual consent . . . is a basic ingredient necessary to support the appropriateness of a multiemployer unit." *Andes Fruit Co.*, 124 NLRB 781, 783 (1959); see also *Rayonier, Inc.*, 52 NLRB 1269 (1943); *Great Atlantic & Pacific Tea Co.*, 145 NLRB 361, enforced in relevant part, 340 F. 2d 690 (2d Cir. 1965). And the Board has not found inappropriate a unit where there was consent as evidenced by a history of multiemployer bargaining.

As for withdrawal, the Board has held that an employer may freely withdraw, subject only to the requirement that, unless there is mutual consent, notice of withdrawal must be timely and unequivocal. *Retail Associates, Inc.*, 120 NLRB 388 (1958); *Anderson Lithograph Co.*, 124 NLRB 920, 928-9 (1959), enforced sub nom. *NLRB* v. *Jeffries Banknote Co.*, 281 F. 2d 893 (9th Cir. 1960); *Detroit Window Cleaners Union*, 126 NLRB 65, 70-1 (1960), and cases cited; *Milk & Ice Cream Dealers of Greater Cincinnati*, 94 NLRB 23, 25 (1951); *York Transfer & Storage Co.*, 107 NLRB 139. This rationale had not before this case and *Evening News* been extended by the Board to an instance of union withdrawal from a multiemployer unit. Cf., however, *Retail Associates*, at 395; *NLRB* v. *Truck Drivers Local* (*Buffalo Linen*), 231 F. 2d 110, 115-6 (2d Cir. 1956), reversed 353 U. S. 87 (1957). The Supreme Court there left the question open.

The Board's position has the advantage of simplicity and of apparent equality of treatment of parties on both sides of the table. It has had little consideration in the courts, although this court in *NLRB* v. *Truck Drivers Local* (*Buf-*

falo Linen), *supra*, remarked that it would seem only fair that a union be accorded equal withdrawal privileges. As noted above, the Supreme Court expressly reserved the question, 353 U. S. 87, 94 n. 22. The arguments against the Board's position are forcefully stated by Member Brown dissenting in both *Evening News Association* and in this case.

Essentially, the Board held that since multiemployer bargaining may be initiated only on consent of the parties, it may be terminated by timely withdrawal of consent by either party. The only limitation would appear to be that the withdrawal must be genuine, that is, "unequivocal." Member Brown would hold that consent once given, and the multiemployer-union relationship once entered into, the Board has the power and duty to determine whether the aims of the Act are best served by allowing union withdrawal or forbidding it.

While the question is not wholly free from doubt, we conclude that the Board was correct in determining that the Congress did not intend to instruct it to require an unwilling union to continue in the consensual relationship if it unequivocally withdrew its consent. Denial of the right to withdraw might well discourage formation of multiemployer bargaining units for fear of being locked into a unit that might later prove antagonistic to the interests of the consenting party.

To be sure, the multiemployer bargaining unit sometimes has considerable advantages for both parties to the relationship, and particularly in fields where large numbers of small employers are typical it has been favored, and such bargaining units found appropriate. And withdrawal of a union from such a multiemployer unit relationship may have much more harmful effects on the continuing of this

type of bargaining than withdrawal of one or more employers. This may, in a situation such as the New York newspaper field we have here, substantially tilt the balances on the side of the economic power of the union against the employers. But the Congress while encouraging bargaining has not attempted to destroy the economic weapons of either party to industrial labor disputes. *NLRB* v. *Ins. Agts. Int'l Union*, 361 U. S. 477 (1960); *NLRB* v. *John Brown, et al.*, 380 U. S. 278 (1965); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300 (1965). It has recognized and enforced the employees' right to self organization and collective bargaining, but left intact the right to use the economic weapons of strike and lockout when good faith bargaining fails, without authorizing the Board to put its thumb on the scales in the bargaining process.[1]

The employers fear the whipsaw strike if the bargaining must be between the individual units the Board has held appropriate and the union. We may doubt that this fear is entirely justified in view of the history of employers moving in and out of the unit here in the past, of the possibility of bargaining through the Association as designee of each employer in its individual bargaining, and of the

---

[1] Studies were undertaken by a subcommittee of the House Committee on Education and Labor in the 88th Congress—see Committee print "Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process," Report of the General Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 88th Congress, 2d Session.

The Committee collected many views on the general subject, and noted among other problems the question before the courts in the case and in *Evening News*. It did not reach the point of suggesting any specific legislation to the full committee, recommending instead further exploration of the subject. About all that can be drawn from the report is that the subcommittee at the time of the report was generally favorable to the continuation of multiemployer bargaining in principle.

as yet not fully explored mutual lockout possibilities even after forced dissolution of the bargaining unit.[2] In any case, requiring the Board to weigh and act on relative bargaining strength in the sense of the potential effectiveness of economic weapons available to each side, in determining appropriateness of bargaining units, would seem enough of a departure from the general scheme of the Act to call for explicit statutory provisions. This is especially so in view of the fierce debates over multiple bargaining during considerations of the Taft-Hartley amendments, and the lack of agreement thereon.[3]

Buffalo Linen suggests (353 U. S. 87, 96-7) that while the Board may, as we have held, permit withdrawal from multiemployer bargaining by certifying individual employer units, it still has a responsibility of determining the limits of the legitimate use of self-help by individual employers to meet their needs which might alternatively have been protected by multi-unit bargaining, and which they fail to obtain by good faith individual bargaining. No such question was before the Board in this proceeding, and we need not consider it here.

The other questions raised require little discussion. There is no substantial attack here on the Board's finding that single employer units are appropriate, except on the ground that the multiemployer unit is the more appropriate. It is sufficient to note that the parties agreed as to job classifications and that a plant or employer size unit is presumptively appropriate.

---

[2] Cf. *Acme Markets, Inc.*, 156 NLRB No. 127, 61 LRRM 1281, and *Weyerhauser Company*, 155 NLRB No. 82, 60 LRRM 1425.

[3] See Legislative History of the Labor Management Relations Act, 1947 (G. P. O. 1948), *Labor Board* v. *Truck Drivers Union (Buffalo Linen)*, 353 U. S. 87, 95.

Finally, petitioners assert the impropriety of forcing them to face an unfair labor practice charge in order to test the appropriateness of the unit. We fail to see any distinction, however, in this respect between the situation here and the case of a new unit, and there the propriety of the procedure has long been recognized. *NLRB* v. *Burroughs Corp.*, 261 F. 2d 463 (2d Cir. 1958); *Sheridan Creations, supra*, 357 F. 2d at 248.

The petition for review is denied. The order of the Board is ordered enforced.

KAUFMAN, *Circuit Judge* (concurring):

The strife between publishers and unions in New York is old, serious and discomforting to the citizens of this city. I fear, as did the dissenting member of the Board in this and *Evening News Association*, that our decision will not alleviate and might, perhaps, exacerbate the antagonisms which have been the antithesis of labor-management peace. Thus, the history of more than 50 years of multiemployer bargaining will be disrupted upon the whim of one of the parties without any reasons assigned and with more abrasiveness sure to follow as a result.

But, I agree with my brother Smith that the solution to any inequities which result from these actions must be supplied by Congress and not this Court. It has been settled law that the Board may not concern itself with the weight of economic weapons in determining an appropriate bargaining unit or in enforcing the collective bargaining provisions of the National Labor Relations Act. Labor-management disagreements ordinarily come to an end when the economic weapon becomes intolerable for either side—with the public ire playing its subtle part in accelerating the

termination of a work stoppage. But, this weapon has been present and used in most labor disputes. If it is to be neutralized or minimized in the circumstances presented in this case, so that a consensual relationship once entered into will continue until the Board makes a determination that "the aims of the Act are best served by allowing union withdrawal or forbidding it," I believe Congress will first have to consider the problem and speak specifically on the subject.

Decree

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME CAPTION]

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the Publishers' Association of New York City, Hearst Consolidated Publications, Inc., Newspaper Enterprises, Inc., Long Island Daily Press Publishing Co., New York World Telegram Corp., News Syndicate Co., Inc., and The New York Times Company, to review and set aside a certain order of the National Labor Relations Board issued against petitioners, on December 21, 1965, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 31, 1966, and has considered the briefs and the transcript filed in this cause. On July 25, 1966, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the above-named petitioners, their respective officers, agents,

successors, and assigns abide by and perform the directions of the Board in said order contained.

LEONARD P. MOORE
Judge, United States Court of Appeals for the Second Circuit

J. JOSEPH SMITH
Judge, United States Court of Appeals for the Second Circuit

Filed: August 26, 1966.

Petition for Stay of Mandate

[SAME CAPTION]

Before:

MOORE, SMITH and KAUFMAN,
Circuit Judges.

Motion to recall decree and stay its reissuance GRANTED, subject to the provisions of Rule 28(c) of this Court.

LPM
JJS
IRK
U.S.C.J.J.

September 8, 1966

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Definitions

Section 2. When used in this Act—

(2) The term 'employer' includes any person acting as an agent of an employer directly or indirectly, . . .

• • • • •

Rights of Employees

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * * *

REPRESENTATIVES AND ELECTIONS

Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

• • • • •

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

• • • • • •

LIMITATIONS

• • • • •

Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

• • • • •

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 635

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-25) is reported at 364 F. 2d 293. The decision and order of the Board (P.A. 12a-17a)[1] are reported at 156 NLRB No. 16.

[1] "P.A." refers to the appendix to petitioners' brief in the court below, a copy of which was filed with the petition.

JURISDICTION

The decision of the court of appeals was issued on July 25, 1966. On August 26, 1966, petitioners' petition for rehearing was denied and a decree was entered (Pet. App. 26-27). The petition for a writ of certiorari was filed on October 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

An employer may withdraw from a multiemployer bargaining unit by giving timely and unequivocal notice. The question presented is whether the Board properly held that a union may withdraw in the same manner.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 29-31 of the appendix to the petition.

STATEMENT

Petitioners are four New York City newspaper publishers and the association which represents them in their bargaining negotiations. For many years, they have engaged in collective bargaining on a multiemployer basis with New York Typographical Union No. 6, which represents composing room employees. During this period, any publisher desiring to bargain on an individual basis has been free to resign from

the Association, and some have done so (P.A. 123a, 171a-172a, 200a, 215a-219a, G.C. Ex. 6.).

On June 26, 1964, the Union advised the Association and each publisher-member that it desired to terminate the existing agreement on its expiration date, March 30, 1965, and to negotiate with each of the publishers separately (P.A. 13a; 286a-289a). On July 21, 1964, the Association, acting on behalf of the publishers, "unqualifiedly reject[ed]" the Union's request for bargaining on an individual employer basis, because, in its view, the Union did not have "the unilateral right to disregard and overturn joint collective bargaining relationships that have existed for many years" (P.A. 13a; 290a-291a).[2] The Union then filed charges with the Board, alleging that the publishers had refused to bargain in violation of the Act (P.A. 13a, 24a; 66a, 290a-291a).

In *Evening News Association*, 154 NLRB No. 121 (P.A. 36a-57a),[3] the Board (with Member Brown dissenting) held that union withdrawals should be governed by the same principle applicable to employer withdrawals from a multiemployer bargaining unit—*i.e.*, the employer can withdraw at will provided that the withdrawal request is timely and unequivocal. Following that decision here, the Board found that

---

[2] It is not disputed that the Union represented a majority of the composing room employees at each publisher's plant (P.A. 24a; 62a).

[3] The Board's decision in *Evening News Association* is presently before the Court of Appeals for the Sixth Circuit, on petitions for review and enforcement.

the Union gave timely and unequivocal notice of its desire to withdraw from the multiemployer unit and to bargain with each publisher individually, and that single-employer units of composing room employees were appropriate under the Act. Accordingly, the Board (with Member Brown dissenting) concluded that each publisher violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of its composing room employees (P.A. 14a-15a). The Board ordered each publisher to cease and desist from such refusal and to bargain with the Union upon request (P.A. 32a-33a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 17-25).

ARGUMENT

The decision of the court of appeals, sustaining the Board's holding that a union may withdraw from a multiemployer bargaining unit on the same terms as an employer, is correct, and there is no conflict of decisions. There is no occasion for further review.

Although the Act does not expressly provide for bargaining units larger than "the employer unit,"[4] the Board, from its earliest days, has concluded that it is empowered to find, and has found, multiemployer units appropriate for bargaining purposes where the parties have mutually consented to bargain, and there

[4] Section 9(b) provides that the Board shall determine in each case whether the appropriate unit for collective bargaining shall be "the employer unit, craft unit, plant unit, or subdivision thereof."

has been a history of bargaining, on a multiemployer basis.[5] As this Court noted in *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 95, proposals made in 1947 "to limit or outlaw multi-employer bargaining * * * failed of enactment." From this, the Court concluded that "Congress intended 'that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future' " (*id.* at 96, quoting from the dissenting opinion in the lower court, 231 F. 2d 110, 121 (C.A. 2)). The Board exercised its "specialized judgment" with respect to the problem presented here in a reasonable manner, and the court below properly declined to disturb that judgment.

Since mutual consent is an essential predicate for the establishment of a multiemployer bargaining unit, the Board has consistently allowed employers to withdraw from an existing multiemployer unit, where the notification of withdrawal has been communicated at a proper time and in an unequivocal manner.[6] The

---

[5] See, *e.g.*, *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002, 1024-1025; *Rayonier Incorporated*, 52 NLRB 1269, 1274-1275; *Andes Fruit Co.*, 124 NLRB 781, 783.

[6] Notification of withdrawal is timely if "given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." *Retail Associates, Inc.*, 120 NLRB 388, 395. See also *Anderson Lithograph Co., Inc.*, 124 NLRB 920, 928-929, enforced *sub nom. National Labor Relations Board* v. *Jeffries Banknote Co.*, 281

consensual basis for a multiemployer unit is impaired when a union withdraws its consent no less than when an employer does. Accordingly, in the Board's view, there is no rational basis for denying "the bargaining representative the same opportunity it allows employers of withdrawing from the multiemployer unit" (P.A. 41a). As the Union's notice of intent to abandon multiemployer bargaining was unequivocal and was communicated well before the start of new negotiations, the Board properly sanctioned the Union's withdrawal from the existing unit.

A different conclusion is not required by the consideration that to permit the Union to withdraw from the multiemployer unit here would allow it to terminate a long history of successful bargaining on a multiemployer basis. As the Board pointed out, the same consequences would follow had a publisher elected to withdraw from the unit. "In either case, the withdrawing party forces the other to forego bargaining in the established multiemployer unit, and in either case, the union may be faced with the possi-

---

F. 2d 893 (C.A. 9); *Detroit Window Cleaners Union, Local 139*, 126 NLRB 63, 70-71; *Tulsa Sheet Metal Works*, 149 NLRB 1487, enforced *sub nom. National Labor Relations Board* v. *Tulsa Sheet Metal Works* (C.A. 10), October 5, 1966.

The statements in *Retail Associates, Inc., supra*, and *Dittler Bros.*, 132 NLRB 444, 446—to the effect that the Board will not permit the parties to control unit determinations under the Act (Pet. 12)—are not inconsistent with the foregoing. The Board was referring to situations where the withdrawal from the multiemployer unit either was not in good faith (*Retail Associates*) or was untimely (*Dittler Bros.*).

bility of having to demonstrate that it has been designated by a majority of the employees in the individual employer units resulting from the breakup of the multiemployer unit * * *" (P.A. 44a).

Nor may a distinction between employer withdrawal and Union withdrawal properly be founded on the view that "[w]hen an employer withdraws from multiemployer bargaining, the structure is left untouched; [but] when a union withdraws 'the very identity, nature and composition' of the employer group are overturned" (Pet. 11). An employer's withdrawal, no less than a Union's, may cause the dissolution of the employer group—for example, when the dominant member withdraws from a multiemployer association or when any member withdraws from a two-employer group. Moreover, the Union's withdrawal does not necessarily require dissolution of the employer group. As the court of appeals correctly pointed out, the publishers may still bargain through the Association "as designee of each employer in individual bargaining" (Pet. App. 22).[7]

Finally, as the Board noted, "[u]nions, like employers, would understandably be reluctant to initiate

---

[7] Petitioners suggest (Pet. 13) that union withdrawal from a multiemployer unit should be curbed because of the danger of whipsaw strikes. But the Board expressly reserved decision as to "whether a union's withdrawal from multiemployer bargaining followed by its striking fewer than all of the former employer members of the larger unit would effectively deny to the employers who are not struck the right to engage in a lockout" (P.A. 42a). See *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 490; *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300.

multiemployer bargaining if the decision to do so were virtually irrevocable. Restricting union withdrawal might therefore in fact discourage multiemployer bargaining and not encourage it" (P.A. 45a).

In view of these considerations, it is clear that the Board's well-considered "specialized judgment" on the question of union withdrawal is a sound one.[8]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

National Labor Relations Board.

NOVEMBER 1966.

---

[8] There is no merit in petitioners' contention (Pet. 14) that, in the circumstances of this case, they should not have been required to test the propriety of the new units sought by the Union in an unfair labor practice proceeding. As the court of appeals correctly observed (Pet. 24), this situation is no different from that in which any new bargaining unit is involved. See, *e.g.*, *National Labor Relations Board* v. *Burroughs Corp.*, 261 F. 2d 463 (C.A. 2).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 236648 346

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 25 1966
JOHN F. DAVIS, CLERK

No. 635

IN THE

Supreme Court of the United States

October Term, 1966

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ET AL.,
Petitioners

vs.

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITION

ROBERT E. McKEAN
Attorney for Detroit Newspaper Publishers Association
Amicus Curiae
800 First National Building
Detroit, Michigan 48226

Daniel J. Tindall, Jr.
Lawrence M. Kelly
Of Counsel
800 First National Building
Detroit, Michigan 48226

THE INLAND PRESS, DETROIT, MICHIGAN

INDEX

	Page
Interest of Amicus Curiae	1
Reasons for Granting The Writ	2
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brown Food Stores, 137 NLRB 73 (1962), enf. den. sub nom *Brown* v. *NLRB*, 319 F 2d (10th Cir. 1963), Aff'd 380 U. S. 278 (1965) 4, 11

Buffalo Linen Supply Co., 109 NLRB 447 (1954), enf. den, sub nom, *Truck Drivers Local Union* v. *NLRB*, 231 F 2d 110 (2d Cir. 1956), rev'd 353 U.S. 87 (1957) 2, 3, 4, 8

Evening News Assoc., 154 NLRB No. 121 (1965); 154 NLRB No. 123 (1965) 2, 3, 4

General Teamsters Local Union No. 324, 127 NLRB 488 (1960) 9

Operating Engineers Union (Cascade Employers Assoc.), 141 NLRB 469 (1963) 9, 10

Publishers Assoc. of N. Y. City, 156 NLRB No. 16 (1965) 4

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 10

Statutes:

Section 8(b)(1)(B), *National Labor Relations Act* as amended (61 Stat. 136, 29 U.S.C. Secs. 151 et seq.) 8, 9, 10

Other:

Cox, *Cases on Labor Law*, 151 (4th Ed. 1958) 7

Cox, *The Uses and Abuses of Union Power*, 35 Notre Dame Lawyer 624 7

Page

Gregory, *Labor Union Power and the Public Interest, Introduction,* 35 Notre Dame Lawyer 591, 592 6
Meltzer, *Lockouts Under the Taft-Hartley Act,* 24 U. Chi. L. Rev. 70 (1956) 4, 8
Note, 41 N.Y.U.L. Rev. 651 (May 1966) 5
Note, 44 Texas L. Rev. 1047 (April 1966) 5
Report of the Committee on Development of the Law under National Labor Relations Act, Section of Labor Relations Law of the American Bar Assoc.:
(1959) 5
(1966) 5
Taylor, Preface to Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* 7
Senate Report 105, p. 21, 1 Legis. Hist. 427 9
Quarterly Report of General Counsel (NLRB) for period ending September 30, 1966 10

No. 635

IN THE

Supreme Court of the United States

October Term, 1966

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ET AL.,
Petitioners

vs.

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITION

With the consent of all parties, Detroit Newspaper Publishers Association files this Brief *amicus curiae* in support of the petition of the Publishers' Association of New York City, *et al*, for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

INTEREST OF AMICUS CURIAE

The interest of Detroit Newspaper Publishers Association in the proper resolution of the multi-employer bargaining question at bar is that of any party who has for many years engaged in bargaining on a multi-employer basis. More particularly, the newspaper publishers in Detroit, as well as in New York and virtually every other major city in

the United States, have historically bargained through an employer association with a number of multi-employer unions, including the Typographical Union. Further, *amicus* was the respondent in the landmark Board decisions on the question of employees' right to dissolve employer groups.[1] Those two cases have been consolidated and are presently pending in the Court of Appeals for the Sixth Circuit on petitions for review and enforcement. *Detroit Newspaper Publishers Association, et al,* v. *National Labor Relations Board,* Nos. 16,855 and 16,856, Sixth Circuit.

REASONS FOR GRANTING THE WRIT

1. The question presented by this case is whether employers who long have been associated for the purpose of bargaining with their respective employee groups (which groups are combined into a multi-employer union), violate Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, if they do not dissolve their associated bargaining group upon the mere written demand by the multi-employer union that they do so.

The present resolution of this question by the Court of Appeals for the Second Circuit (Pet. App. A, pp. 17-25) was presaged by its *dictum* expression of some ten years earlier (*Truck Drivers Union* v. *NLRB,* 231 F. 2d 110), that it could see "no rational basis" for distinguishing a union "withdrawal" from an employer withdrawal. 231 F. 2d 110 at 116. "[I]t would seem only fair", the court remarked in 1956, "that the union be accorded the same privilege of voluntary withdrawal as is enjoyed by the employer . . ." 231 F. 2d 110 at 115.

The Court of Appeals in its present (July 25, 1966) decision, stressed the "apparent equality of treatment" in the

---

[1] *Evening News Ass'n,* 154 NLRB No. 121 (1965) (P.A. 36a-57a); 154 NLRB No. 123 (1965).

Board's extension of the "withdrawal"[2] right to employees (Pet. App. A, p. 20). The Court of Appeals' 1956 *dictum* (as well as its then decision that associated employers could not meet a whipsaw strike with a lockout) was based on a view of the legislative history which this Court, after a review of the pertinent legislative history, expressly rejected. *NLRB* v. *Truck Drivers Local Union No. 499 (Buffalo Linen)*, 353 U.S. 87 at 94 (1957).

This Court expressly reserved decision as to the "equal withdrawal right" question until such time as "it is properly before us." *Buffalo Linen*, 353 U.S. 87 at 94, n. 22. The question now is squarely presented in the instant case and the question again has come to this Court by way of the Court of Appeals for the Second Circuit.

The Court of Appeals decided the question as it had in 1956. While offering in its present decision no analysis of the Taft-Hartley Act and its legislative history, the Court echoed its conclusion of ten years before that "the fierce [congressional] debates over multiple bargaining" contain no guide for resolution of multi-employer questions, the debates demonstrating only "the lack of agreement thereon" (Pet. App. A, p. 32). The National Labor Relations Board shared the Second Circuit's conclusion that Congress has provided no assistance in the resolution of the "with-

---

[2] Union "withdrawal" is a misnomer which reveals a crucial error in the Court of Appeals' and the Board's analysis in the present case. As dissenting Board Member Brown stated in *Evening News Ass'n* (P.A. 51a-52a):

> "'It is apparent that an employer's right to withdraw its participation in, and negotiation through, an association or group is entirely different from the asserted right to require an employer to withdraw. In fact, the term "union withdrawal" is misleading, for a union does not withdraw unilaterally, but compels an employer to forego group action and pursue an independent course. Thus, when a union withdraws, it remains unaffected as an entity while requiring a change in the very identity, nature and composition of the employer with whom bargaining is to be conducted.'"

drawal" question.[3] Both tribunals in effect have treated the question as an administrative one only with the Taft-Hartley Act somehow not applicable.[4]

The Board's commencement of its analysis of the withdrawal question with the conclusion that exit rights must be "equal", was anticipated by at least one respected commentator on labor law, Professor Bernard Meltzer, of the University of Chicago Law School. Professor Meltzer, in his 1956 examination[5] of the "basic considerations pertinent to mutual rights of withdrawal," warned that " . . . the argument for equality of treatment has its customary appeal . . . " But, he continued, the equality approach "involves the risk of over-simplification." *Ibid.*

Professor Meltzer stressed the central role that the Taft-Hartley Act's legislative history must play in the resolution of the "withdrawal" question:

> "Before this [equality] argument can be appraised, a prior question must be faced: What are

---

[3] See *Evening News Association*, 154 NLRB No. 121 (1965) (Pet. App. 36-57a); *Publishers Assoc. of N.Y. City*, 156 NLRB No. 16 (1965) (Pet. App. 12-17a).

[4] The Board (P.A. 47a) and the Court of Appeals (Pet. App. A, pp. 17-25) each apparently relied upon this Court's statement in *Buffalo Linen* that "Congress . . . intended to leave to the Board's specialized judgment, the inevitable questions concerning multi-employer bargaining bound to arise in the future." 353 U.S. 87, 96. Certainly, however, the Board's "specialized judgment" does not control where Congress has spoken. What the lower tribunals did not emphasize is this Court's reference to the above-quoted *Buffalo Linen* language in *Labor Board* v. *Brown*, 380 U.S. 278 at 291-292, where this Court said, in affirming the Tenth Circuit's reversal of the Board's exercise of judgment in resolving a multi-employer question:

> "Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem *inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.*"
> " . . . '[t]he deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'"

[5] See Meltzer, *Lockouts Under the Taft-Hartley Act*, 24 U. Chi. Law Review 70 at 94 (1956).

> the reasons for sanctioning the multi-employer unit? If, as the pertinent legislative history suggests, such units are sanctioned as an offset to union power, unlimited rights of union withdrawal from an established unit are as paradoxical as similar rights to an employer to abandon collective bargaining."

This warning against a simplistic resolution of the fundamental joint bargaining question of whether employees may dissolve employer groups, was reiterated by the Section of Labor Relations Law of the American Bar Association. In that Section's 1959 "Report of the Committee on Development of the Law under National Labor Relations Act",[6] the Committee noted the conflict between "equality" of union "withdrawal" and the legislative purpose of the Act, and stated:

> "Such equality seems on the surface to be fair and proper. But does it square with the reasons for [Congress'] sanctioning the multi-employer unit?" *Id.* p. 18.

The Committee urged that the Board's resolution of the withdrawal question be "accompanied by an exploration of the basic considerations behind the legislative sanction of multi-employer units." *Ibid.*

One need only review the Board decisions[7] and the Court of Appeals decision (Pet. App. A, pp. 17-25) to see that the fundamental and far-reaching "withdrawal" question has made its way to the present stage of litigation without any

---

[6] Section of Labor Relations Law, American Bar Association (1959). In the 1966 Report of the Committee on Development of the Law under the National Labor Relations Act, the Committee noted that the "key logical weakness" in the *Evening News Ass'n* decision was that identified by dissenting Board Member Brown (see f.n. 2, *supra*) and predicted that the "decision may well augur a complete upheaval in multi-employer bargaining . . . " A.B.A. Labor Law Section Report 423-424 (1966). Law Review commentary has likewise been critical. See 41 N.Y.U.L. Rev. 651, (May 1966), and 44 Texas L. Rev. 1047 (April 1966).

[7] See FN 3, *supra*.

real attempt to examine the legislative history to ascertain the purpose of Congress.

2. It is respectfully submitted that there is more in the legislative history than that noted by the Court of Appeals: "fierce debates" ending in a "lack of agreement" (Pet. App. A, p. 23). This Court found much more, in resolving the *Buffalo Linen* question. And, while there was in that case no occasion to search the history in regard to the expressly-reserved "withdrawal" question, it is submitted that this Court should now address itself to that history.

For, fully examined, the Taft-Hartley Act and its legislative history show that Congress in 1947 intended to give, and did give, employers a right to group on their side of the bargaining table, and to stay grouped so long as their respective employee groups remain combined in a multi-employer union.

A review of the history shows that as the Senate and House of Representatives in 1947 drafted, debated and adopted the Taft-Hartley Amendment, these Congressional bodies became deeply involved in an examination of multi-employer bargaining. Surveying the development of labor relations in the twelve years following the 1935 enactment of the Wagner Act, Congress expressed clear concern over the emergence of the powerful, broadly-organized unions which dominated the labor scene. There was an evinced feeling that in the short twelve years since the adoption of the Wagner Act, the formerly fragmented employees had perhaps over-organized in creating their multi-employer unions. As one commentator put it, unions "grew big overnight—exactly what Congress wished at that time." But, in 1947, "union activity . . . suggested to Congress that it may have overshot the mark." Gregory, *Labor Union Power and the Public Interest* (Introduction), 35 Notre Dame Lawyer 591, 592. One of the broad goals of Congress in Taft-Hartley was equalization of the positions of employer and union;

the achievement in Professor Cox's words, of "a new balance" . . . "[a] redress [of] the balance of power in the collective bargaining process." Cox, *Cases on Labor Law* 151 (4th Ed. 1958).

A specific reaction of many in Congress was to propose breaking up, or otherwise restricting, the broad unions and the multi-employer approach that they had created.[8] That Congress' disenchantment with multi-employer bargaining was not so much a concern about such bargaining as it was about the large unions which had caused the creation of the phenomenon, is shown by specific proposals presented. Professor Cox has briefly summarized these 1947 efforts:

> "The Hartley bill and Ball amendment of 1947 sought to limit the size and power of unions by reference to the product market. They proposed to eliminate 'industry-wide bargaining' (a misnomer for industry-wide unionization) by confining the bargaining rights of each union to the employees of a single employer, and then forbidding the several company-wide unions to coordinate their negotiations either directly or through an international union." Cox, *The Uses and Abuses of Union Power*, 35 Notre Dame Lawyer 624, 630.

While Congress rejected the break-up of broad unions (*Buffalo Linen*, 353 U.S. 87 at 95), it is clear that the decision cannot be taken as indication that Congress after debate had decided that these unions and their power were not a problem; rather, Congress decided to follow a positive approach in restoring some equality to the employers who face the employee groups amalgamated in these broad unions. This restoration of balance was to be achieved by, and is embodied in, Congress' ratification, approval and protection of the long-standing practice of employers or-

---

[8] See e.g. Taylor, *Preface* to *Freidin, The Taft-Hartley Act and Multi-Employer Bargaining* at iii.

ganizing into units correlative in scope to that of the multi-group unions which they face.

Thus this Court in *Buffalo Linen* rejected out of hand the conclusion of the Court of Appeals for the Second Circuit (in *Truck Drivers Local Union* v. *NLRB*, 231 F. 2d 110 (1956)) that "the inaction of Congress with respect to multi-employer bargaining . . . indicate(d) an intention to leave the resolution of this problem to future legislation." This Court rather decided that the "compelling conclusion" from a review of the legislative history was that Congress had approved the practice of employers joining together for bargaining. 353 U.S. 87 at 95-96, 94. It was noted that "multi-employer bargaining long antedated the Wagner Act . . . ", and that since that 1935 Act "this basis of bargaining has had its greatest expansion . . . because employers have sought through group bargaining to match increased union strength." 353 U.S. 87 at 94-95. In approving the use of the lockout by an organized group of employers, this Court based its approval of the group's use of the lockout on Congress' approval of employer group bargaining "as a means of bargaining on an equal basis with a large union . . . " 353 U.S. 87, 94-95.[9]

Beyond the intent and purpose evident in the overall legislative history, Congress, by inserting a specific new section into the 1947 Act, decisively confirmed its view of employer group bargaining. The addition of the new sec-

---

[9] In this connection see, Meltzer, *Lockouts Under the Taft-Hartley Act*, 24 U. Chi. L. Rev. 70 at 88 (1956), where he notes that those who prevailed against the breaking up of multi-employer bargaining, urged the following:

> "Opponents of such limitations urged that the growth of union power made it necessary for smaller employers to bargain on a group basis to achieve approximate 'equality' with unions and that multi-employer bargaining was necessary to protect individual employers against divide-and-conquer tactics, i.e., to prevent the union from singling out an individual employer, securing its demands from him and thereby setting standards for his competitors."

tion, 8(b)(1)(B),[10] made it clear that Congress was not only approving the long-standing practice of the creation of employer groups for bargaining, but that Congress intended to and did give employer groups protection against union attempts to break up such groups against their will.

The Senate Labor Committee Report stated the purpose of 8(b)(1)(B) as:

> "Section 8(b)(1): This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purpose of collective bargaining or the settlement of grievances. *Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members;* also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who had been delegated the function of settling grievances." Senate Report 105, p. 21, quoted in 1 Legis. Hist. 427. (Emphasis added.)

Section 8(b)(1)(B) has been so applied. In *General Teamsters Local Union No. 324*, 127 NLRB 488 (1960), the Board held that a union had violated Section 8(b)(1)(B) by activity aimed at "compelling the employers to abandon the Association as their collective bargaining representative and to substitute individual for group bargaining." And in *Operating Engineers Union (Cascade Employers Assoc.)*, 141 NLRB 469, 474 (1963), the Board condemned, as a violation of the 8(b) sections, a union strike attempt "to break . . . employers off from the multi-employer unit represented by [the employer association]."

---

[10] Section 8(b)(1)(B), in pertinent part, provides:

> "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances; . . ."

These Board cases do not speak of the 8(b)(1)(B) right as simply the procedural right to bargain through chosen personnel or entities, but rather make clear that the Board, until the advent of the present "withdrawal" litigation, recognized that Congress, in enacting 8(b)(1)(B), gave employers a substantial right, that of banding, and staying, together in bargaining as a group with a multi-employer union. There is nothing in these Board cases to suggest that 8(b)(1)(B) is honored if the union "allows" the association to continue as the representative of the employers in "separate and individual" bargaining; rather the 8(b)(1)(B) right of employers is stated, by the Board, to be the right to *stay grouped;* to (in the Board's words) not be "broken off" one from the other. 141 NLRB 469, 474 (1963).

Yet, remarkably, 8(b)(1)(B) is nowhere referred to in either the Board or Court of Appeals decisions in the present case.

CONCLUSION

This Court resolved the multi-employer question in *Buffalo Linen* only after a search for, and an analysis of, the relevant legislative history. The more fundamental multi-employer question posed by the instant litigation[11] has been

---

[11] For instance, aside from exposure to whipsaw strikes and the Board's restrictive view of the availability of the lockout (see Quarterly Report of General Counsel for period ending September 30, 1966 (63 L.R.R. 197 at 198-199), the importance to employers of their right to join together and to remain together in a multi-employer bargaining group is underscored by this Court's recent decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), where Mr. Justice White said at p. 664:

"It is true that wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94-96. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product

to date decided without such consideration of the Congressional purpose, notwithstanding this Court's recent admonition that administrative boards and reviewing courts are not free to ignore "a statutory mandate or . . . the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278 (1965).

For these reasons it is respectfully urged that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

ROBERT E. McKEAN
Attorney for Detroit Newspaper
Publishers Association,
Amicus Curiae
800 First National Building
Detroit, Michigan 48226

Daniel J. Tindall, Jr.
Lawrence M. Kelly
Of Counsel
800 First National Building
Detroit, Michigan 48226

---

[11] market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. [Citations Omitted.] We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws. . . ."